(6)



No. 00-607

In the Supreme Court of the United States

RONALD A. GRAY, SPECIALIST FOUR
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (CAPITAL CASE)

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

During peacetime, do the Fifth, Sixth and Eighth Amendments permit a member of the Armed Forces to be convicted and sentenced to death by a court-martial panel of less than twelve members when there is no fixed panel size?

II

During peacetime, does the convening authority's power to hand-pick military subordinates, whose careers he can directly and immediately effect and control, to serve as court members in a capital court-martial violate the Fifth, Sixth, and Eighth Amendments?

III

Can an appellate court *assume* that the trial judge made a determination as to whether the prosecutor's explanation was credible or pretextual pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), without conducting a further hearing on the issue, when the trial judge ruled on petitioner's *Batson* claim before the prosecutor provided a race-neutral explanation for the challenge?

TABLE OF AUTHORITIES

Cases **Page**

Ballew v. Georgia, 435 U.S. 223, 245 (1978). 3

Batson v. Kentucky, 476 U.S. 79 (1986). 1, 8, 9

Ex p*arte Quirin*, 317 U.S. 1 (1942). 2

Hernandez v. New York, 500 U.S. 352, 365 (1991). 9

Irvin v. Dowd, 366 U.S. 717, 721-22 (1960). 3, 4

Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000). 10

Loving v. United States, 517 U.S. 748 (1996). 2, 3, 7

Morgan v. Illinois, 504 U.S. 719 (1992). 2, 4

Purkett v. Elem, 514 U.S. 765 (1995). 9

Turner v. Louisiana, 379 U.S. 466 (1965). 3, 4

United States v. Hurn, 52 M.J. 629 (N-M.C. Ct. Crim. App. 1999), *pet. granted*, 54 M.J. 278 (2000). 9

United States v. Moore, 28 M.J. 366 (C.M.A. 1989). 6

United States v. Robinson, 53 M.J. 749 (Army Ct. Crim. App. 2000). 9

United States v. Ruiz, 49 M.J. 340 (1998). 9

United States v. Santiago-Davila, 26 M.J. 380, 390 (C.M.A. 1989). 9

United States v. Tulloch, 47 M.J. 283 (1997) 9

Williams v. Florida, 399 U.S. 78 (1970). 5

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). 3

Constitutional, Statutory and Regulatory Provisions

United States Constitution, Fifth Amendment 2, 3, 4

United States Constitution, Sixth Amendment 2, 3, 4

United States Constitution, Eighth Amendment 2, 3, 4, 5

10 U.S.C. § 801 et seq 5

Uniform Code of Military Justice, Article 18,
10 U.S.C. § 818. . . . . .3, 4

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Ronald A. Gray, files the following reply to the United States' brief in opposition to his petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Armed Forces affirming his conviction and sentence to death.

I

STATEMENT OF THE CASE

Respondent is correct in stating that immediately after defense counsel objected to the government's peremptory challenge on grounds of *Batson v. Kentucky*, 476 U.S. 79 (1986), the military judge "noted that the defense itself had earlier sought to strike Major Quander for cause." (Resp. 4). Respondent fails to inform this Court, however, that the military judge's recollection was incorrect. The record clearly reflects that neither side

challenged Major Quander for cause. (R. at 586). Therefore, petitioner has in no way waived the *Batson* issue.

II

THE FIFTH AND EIGHTH AMENDMENTS DEMAND THAT SERVICEMEMBERS IN CAPITAL CASES ARE AFFORDED FAIR, IMPARTIAL, AND RELIABLE TRIBUNALS.

Respondent's brief (Resp. 9) suggests that, because there may be no right to trial by jury in the military grounded in the Sixth Amendment, there are no errors of constitutional dimension in petitioner's case. This conclusion is incorrect. Respondent misstates the context of this Court's precedents on jury composition in capital cases. In *Morgan v. Illinois*, 504 U.S. 719 (1992), this Court held that when the government chooses to have juries take on the responsibility of imposing death sentences, that Due Process and Sixth Amendment guarantees apply. As this Court in *Morgan* stated, "due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." 504 U.S. at 727.[1]

Petitioner acknowledges a court-martial panel is not a jury, and that this Court has previously held that courts-martial are

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[1] Indeed, at the time this Court rendered its opinion in *Ex parte Quirin* 317 U.S. 1 (1942), which discusses the right to a jury trial for members of the military, the governing law for soldiers was the Articles of War. The Articles of War prohibited trial by courts-martial for murder committed in the United States during times of peace. *See Loving v. United States*, 517 U.S. 748, 752-54 (1996) (outlining the history of courts-martial jurisdiction for capital offenses). Historically, a case such as petitioner's might not have been tried by court-martial at all, but rather likely would have been tried in a civilian court.

not subject to the jury trial requirements of the Sixth Amendment. Nevertheless, the Fifth and Eighth Amendments demand that all servicemembers charged with capital offenses have their cases heard by a fair, impartial, and reliable tribunal. *See Irvin v. Dowd*, 366 U.S. 717, 721-22 (1960) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Just as a sentence to death by a five-person jury in a civilian case would unquestionably violate the Constitution, *see Ballew v. Georgia*, 435 U.S. 223, 245 (1978), a sentence to death by a court-martial panel of five members seriously calls into question the fairness, impartiality and reliability of the verdict. The fact that the size of the panel that heard petitioner's case was a mere six members in no way diminishes the potential for unfairness, partiality, or unreliability of the tribunal's verdict and sentence. The right of all servicemembers to a fair and impartial tribunal should comport with the constitutional protections guaranteed to all citizens. *See generally Loving*, 517 U.S. at 774 (Stevens, J., concurring).

A. The UCMJ Mandates Trial by Jury in Capital Cases

To counter petitioner's assertion that a military jury of fewer than twelve members may not constitutionally sentence a servicemember to death, respondent points out that nine states require death sentences to be imposed by judges. (Resp. 10-11). Respondent's brief, however, fails to consider that a servicemember in a capital cases must be sentenced by a court-martial panel. Unlike defendants charged with capital offenses in state and federal district courts, and even unlike servicemembers in non-capital cases, the petitioner in this case had neither the right nor the option to have his sentence determined by a judge. Article 18 of the Uniform Code of Military Justice (UCMJ) provides that a general court-martial composed of a military judge alone (that is, a court-martial in which there is no panel) "shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." Article 18, UCMJ, 10

U.S.C. § 818.[2]

B. Due Process Mandates a Fair, Impartial, and Reliable Verdict as to Both Findings and Sentence

Contrary to respondent's assertion (Resp. 10 n.2) that "petitioner does not claim that the panel was too small to find him guilty, but only to sentence him to death," the Petition for a Writ of Certiorari clearly points out that servicemembers are the only capital defendants in this country whose guilt or innocence is not decided by a twelve-member jury. (Pet. 9). Furthermore, in consideration of the fact that a unanimous verdict to a death-eligible offense is one of the prerequisites to sentencing a servicemember to death, such that it only takes a single vote to prevent death from being imposed at the guilt or innocence stage, petitioner most definitely contests the fairness and reliability of being found guilty by a six-member tribunal, when all civilians have their guilt or innocence determined by twelve-person juries. *See Morgan*, 504 U.S. at 727; *Irvin*, 366 U.S. at 722; *Turner*, 379 U.S. at 471-72.

C. There is a Societal Consensus for Twelve-Person Juries in Capital Cases

Respondent's conclusion there is "no societal consensus that imposition of a death sentence requires the unanimous decision of 12 individuals" (Resp. at 10) is incorrect. As this Court noted more than thirty years ago, "[i]n capital cases . . . it appears that no State provides for less than 12 jurors – a fact that suggests implicit recognition of the value of the larger body as a

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[2] The fact that a military member in a death penalty case must be tried and sentenced by a court-martial panel rather than by a judge makes the process for selecting panels critically important to the protection of servicemembers' rights under the Fifth, Sixth, and Eighth Amendments. Petitioner asserts that the statutory requirement that panels alone can impose courts-martial death sentences requires the practices relating to the selection and qualification of court-martial panels to be subject not to judicial deference, but rather a searching judicial scrutiny.

means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). It is clear, then, there is indeed a societal consensus that only twelve-person juries or judges shall have the power to impose a sentence to death. The only capital jurisdiction in the United States operating contrary to this consensus is the military, which, although requiring a tribunal of panel members, does not mandate a specific number of members beyond the minimum number of five.

D. There is No Legitimate Government Interest Against a Twelve-Member Tribunal

Respondent suggests that requiring capital court-martial cases to have panels of twelve would detract from the "essential function of the military," which is to train for war and to fight wars if necessary. (Resp. 11). Such a suggestion is without merit, however, in a court-martial held during peacetime, as was petitioner's case. Petitioner's conclusion treats courts-martial as mere distractions from the military's mission. Congress has vested in commanders responsibility for enforcing military discipline, and has provided the court-martial system set forth in the Uniform Code of Military Justice (10 U.S.C. § 801 et seq.) as one of the tools commanders have for that purpose. However, the UCMJ is silent on the issue of how many persons should sit as members in capital courts-martial, instead leaving this decision in the hands of the commanders who are the convening authorities for each case[3].

In petitioner's case the convening authority initially detailed fifteen people to serve as panel members. Presumably then, when the convening authority decided to seek the death penalty by referring the petitioner's case to trial as a capital case, he also determined fifteen soldiers could, as the respondent puts it,

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[3] Indeed, the arbitrariness of the convening authority's ability to decide how many persons to detail to any given case is mentioned in the Petition for a Writ of Certiorari as evidence that this process violates the Eighth Amendment's guarantee against cruel and unusual punishment. (Pet. 15-16)

be "diverted" from their military duties to serve as panel members. Through the exercise of challenges this number was reduced by nine, to the six members who ultimately heard petitioner's case and sentenced him to death. (R. at 767). Those who were excused as a result of the challenge process were released to return to their regular military duties (*See e.g.* R. at 528), which indicates the convening authority had fewer persons diverted from duty than he presumably anticipated when he selected the original members.

The military judge refused defense counsel's request to delay the trial in order to allow the convening authority to select additional members in order to ensure a panel of twelve. (R. at 767-69). Furthermore, the military judge refused, at the prosecutor's behest, to transmit the request to the convening authority to enable him to make a determination as to whether to detail additional members. The military judge's denial of petitioner's request for a twelve-person tribunal thwarted the convening authority's discretion to determine how many members should have heard petitioner's case.

Although there may have been a time, as respondent asserts (Resp. 11), when Congress' determination to provide convening authorities with the discretion to convene courts-martial with fewer than twelve members may have been a reasonable one, this is certainly not the case today, when our Armed Forces have an authorized strength of over 1,385,000 personnel. See Nat'l Def. Auth. Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Furthermore, when the punishment may be death, such a determination is entirely unreasonable. Clearly, providing petitioner with a twelve-member court-martial panel would have in no way posed any threat to our nation's security.[4]

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[4] At the time of petitioner's court-martial, more than 40,000 soldiers were stationed at Fort Bragg, North Carolina, the site of petitioner's trial. The vast majority of these soldiers would have been available for court-martial duty. *See* http://www.bragg.army.mil/history/HistoryPage/History%20of%20Fort%20Bragg/FortBragginthe1980s.htm for a description of Fort Bragg in the 1980s, the time of petitioner's trial.

This Court should grant review of petitioner's case to determine the fairness, impartiality, and reliability of capital trials heard by a tribunal comprised of fewer than twelve lay persons because, "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving*, 517 U.S. 774 (Stevens, J., concurring).

III

THE LACK OF A FIXED PANEL SIZE ISSUE WAS NOT FORFEITED.

Contrary to respondent's assertion (R. at 12), the petitioner did raise the issue of the lack of fixed panel in a petition for reconsideration to the Court of Appeals for the Armed Forces (CAAF), which denied relief. (*See* Second Petition for Reconsideration, filed Apr. 18, 2000). Under CAAF's Rules of Practice and Procedure, a second petition for reconsideration will not be filed unless accompanied by a motion for leave to file and unless such motion is granted by the Court. (*See* Rules 30 and 31, Rules of Practice and Procedure, Court of Appeals for the Armed Forces, Feb. 27, 1996). Petitioner complied with the CAAF Rules and the Court granted the petitioner's motion for leave to file a second petition for reconsideration. Thus, the issue regarding the lack of a fixed panel in petitioner's case was properly raised to the appropriate court, which considered and rejected it.

IV

CONGRESSIONAL ACTION WOULD NOT MOOT THE ISSUE OF THE CONVENING AUTHORITY'S SELECTION OF THE PANEL MEMBERS IN PETITIONER'S CASE.

Respondent suggests that because Congress has

considered changing the present method of selecting court-martial members, this Court's review of this issue is not appropriate due to the possibility of mootness. This argument misses the mark. Petitioner is under a sentence to death. Therefore, any possibility of congressional action on this issue would be of little comfort to petitioner, who was convicted and sentenced to death by a court-martial panel hand picked by the convening authority, pursuant to the existing system for selection of members.[5]

V

BATSON ISSUES REGARDING A TRIAL JUDGE'S DETERMINATION OF WHETHER THE DEFENDANT HAS ESTABLISHED PURPOSEFUL DISCRIMINATION CONTINUE TO PLAGUE MILITARY APPELLATE COURTS.

Contrary to respondent's contention that the *Batson/Moore*[6] issue raised in petitioner's case is of "no continuing importance[7]," military courts still struggle with issues relating to peremptory challenges of women and minority group members. In particular, the sufficiency of military judges' findings regarding whether the government has met its burden to rebut a prima facie case of purposeful discrimination, a judicial

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[5] The possibility of Congressional reform in this area would also be of little comfort to the other five servicemembers who were sent to the military's death row by panel members personally selected by their convening authorities.

[6] *Batson v. Kentucky*, 476 U.S. 79 (1986); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). As respondent recognizes, in *Moore* the Court of Military Appeals applied *Batson* to the military, and prescribed specific procedures for dealing with peremptory challenges of minority group members.

[7] The *Batson* issue was of considerable significance to the two dissenting CAAF judges, who held that the military judge prejudiced petitioner's constitutional rights by failing to apply this Court's clear precedent in *Batson*. (*See* Pet. App. 145a-59a).

responsibility emphasized by this Court in *Batson*, has been called into question again and again. *See, e.g., United States v. Tulloch*, 47 M.J. 283 (1997); *United States v. Ruiz*, 49 M.J. 340 (1998); *United States v. Hurn*, 52 M.J. 629 (N-M.C. Ct. Crim. App. 1999), *pet. granted*, 54 M.J. 278 (2000); *United States v. Robinson*, 53 M.J. 749 (Army Ct. Crim. App. 2000).

Furthermore, to the extent respondent's brief attempts to frame the *Batson* issue as whether the government's race-neutral explanation for its challenge of Major Quander was both timely and sufficient, it misconstrues petitioner's claim. Petitioner has not asserted that the government failed to comply with the second step of the *Batson* inquiry, but rather that the military judge completely failed to comply with Batson's third step of assessing the persuasiveness of the prosecution's race-neutral explanation in determining whether the defense had established purposeful discrimination. *See Batson*, 476 U.S. at 98; *Purkett v. Elem*, 514 U.S. 765, 768 (1995). This Court has specifically assigned to the trial judge the responsibility of determining whether a prosecutor's race-neutral explanation for a *Batson* challenge is not pretextual. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). In *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1989), the CAAF held that *Batson*'s three-step inquiry for resolving peremptory challenges of minority groups members were applicable to the military retroactively. Nevertheless, in petitioner's case, which was tried almost two years after the *Batson* decision, the trial judge failed to follow the *Batson* inquiry, because he wrongly believed *Batson* did not apply.

Batson and its progeny clearly establish that it is the trial judge who presides over the voir dire process who is in the best position to observe the demeanor and appearance of the jurors and counsel. This is why the critical determination of purposeful discrimination at the third *Batson* step must be made by the trial judge, not an appellate court eleven years after the fact. Respondent's argument that the military judge made an "implied ruling" that the prosecutor offered a legitimate race-neutral explanation for his challenge of Major Quander, adopted from the CAAF's majority opinion, misapplies the *Batson* inquiry. *Batson* simply does not provide for an appellate court to substitute its

own judgment regarding the genuineness of a prosecutor's race-neutral explanation for a peremptory challenge, based on a cold record and an unsworn, self-serving statement by the prosecutor, for that of the trial judge who presided over the jury's voir dire more than ten years ago. *See e.g. Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000) (holding a trial judge's denial of a *Batson* motion without explicitly adjudicating the credibility of challenging party's race-neutral explanation to be constitutional error).

CONCLUSION

This Court should grant review of the issues raised in the Petition for a Writ of Certiorari.

Respectfully submitted,

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